Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the *Employment Equity Act* 55 of 1998

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Abstract

The *Employment Equity Act* 55 of 1998 ("EEA") has been amended to include a specific provision dealing with equal pay claims in the form of section 6(4). Section 6(4) of the EEA prohibits unfair discrimination in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value. The Minister of Labour has issued Regulations and a Code to assist with the implementation of the principle of equal pay. Both the Regulations and the Code set out the criteria for assessing work of equal value as well as the grounds of justification to a claim of equal pay for work of equal value (factors justifying differentiation in terms and conditions of employment). The EEA refers to two grounds of justification in respect of unfair discrimination claims, namely affirmative action and the inherent requirements of the job. There is support for the view that these grounds of justification are not suitable to equal pay claims. There is a contrary view that these grounds of justification can apply to equal pay claims. The Labour Courts have not had the opportunity to analyse these grounds of justification in the context of equal pay claims. It is thus necessary to analyse these grounds of justification in order to ascertain whether they provide justifications proper to equal pay claims.

The purpose of this article is to analyse the grounds of justification of pay discrimination as contained in South African law, the Conventions and Materials of the International Labour Organisation and the equal pay laws of the United Kingdom. Lastly, an analysis will be undertaken to determine whether affirmative action and the inherent requirements of the job provide justifications proper to equal pay claims.

Keywords

Equal pay; *Employment Equity Act*; *Equality Act*; International Labour Organisation; Equal Pay Guide; *Equal Remuneration Convention*; grounds of justification to equal pay; affirmative action; inherent requirements of the job.

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1 Introduction

The *Employment Equity Act*[1] has been amended to include a specific provision dealing with equal pay claims in the form of section 6(4). Section 6(4) of the EEA prohibits unfair discrimination in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value. The Minister of Labour has issued Regulations and a Code to assist with the implementation of the principle of equal pay.[2] Both the Regulations and the Code set out the criteria for assessing work of equal value as well as the grounds of justification to a claim of equal pay for work of equal value (factors justifying differentiation in terms and conditions of employment). The EEA refers to two grounds of justification in respect of unfair discrimination claims, namely affirmative action and the inherent requirements of the job.[3] There is support for the view that these grounds of justification are not suitable to equal pay claims.[4] There is a contrary view that these grounds of justification can apply to equal pay claims.[5] The Labour Courts have not had the opportunity to analyse these grounds of justification in the context of equal pay claims. It is thus necessary to analyse these grounds of justification in order to ascertain whether they provide justifications proper to equal pay claims.

The purpose of this article is to analyse the grounds of justification to pay discrimination as contained in South African law, the Conventions and Materials of the International Labour Organisation ("ILO") and the equal pay

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1 *Employment Equity Act* 55 of 1998 ("EEA").

2 Employment Equity Regulations published in GN R595 in GG 37873 of 1 August 2014 ("Regulations"); Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value published in GN 448 in GG 38837 of 1 June 2015 ("Code").

3 Section 6(2)(a)-(b) of the EEA.

4 Meintjes-Van der Walt 1998 *ILJ* 30, who submitted that a pay differential should not be justified on the grounds of affirmative action; Cohen 2000 *SA Merc LJ* 260-261, who stated that both the defences of affirmative action and the inherent requirements of the job do not apply directly to pay discrimination; Pieterse 2001 *SALJ* 17, who suggested that pay equity legislation should include specific defences to pay equity claims; Hlongwane 2007 *LDD* 78, who stated that the EEA does not expressly provide for defences to pay discrimination and it is difficult to reconcile how the defences of affirmative action or the inherent requirements of the job could justify pay discrimination.

5 Landman 2002 *SA Merc LJ* 353, who suggested that affirmative action is a suitable ground of justification to equal remuneration claims and the inherent requirements of the job as a ground of justification is possible in theory.

laws of the United Kingdom. Lastly, an analysis will be undertaken to determine whether affirmative action and the inherent requirements of the job provide justifications proper to equal pay claims.

2 The *Employment Equity Act* and the Employment Equity Regulations

Section 6(2) of the EEA provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. The grounds of justification are thus affirmative action and the inherent requirements of the job. Section 6(4) of the EEA now provides for an explicit provision upon which an equal pay claim can be based. The section introduces three causes of action in this regard; (a) equal pay for the same work, (b) equal pay for substantially the same work and (c) equal pay for work of equal value. There is no section in the EEA which specifically sets out the grounds of justification to equal pay claims. The legislature has thus found it important to include a specific provision in the EEA to deal with equal pay claims but has not found it important to include a section which sets out the specific grounds of justification relevant to an equal pay claim. There is also no section which states that affirmative action and the inherent requirements of the job do not apply to equal pay claims. In the absence thereof, affirmative action and the inherent requirements of the job apply to equal pay claims. The Regulations then goes on to set out factors which would justify pay differentiation. These factors are: (a) seniority (length of service); (b) qualifications, ability and competence; (c) performance (quality of work); (d) where an employee is demoted as a result of organisational restructuring (or any other legitimate reason) without a reduction in pay and his salary remains the same until the remuneration of his co-employees in the same job category reaches his level (red-circling); (e) where a person is employed temporarily for the purpose of gaining experience (training) and as a result thereof receives different remuneration; (f) skills scarcity; and (g) any other relevant factor.[6]

The cardinal question which arises is: do affirmative action and the inherent requirements of the job apply to equal pay claims in the light of the fact that the grounds justifying pay differentiation are specifically set out in the Regulations and the Code? It cannot be assumed that affirmative action and the inherent requirements of the job do not apply to equal pay claims

6 Regulation 7(1)(a)-(g) of the Regulations. This list of factors is repeated in item 7.3.1-7.3.7 of the Code.

because the factors justifying pay differentiation are set out in the Regulations and the Code, as these grounds of justification are set out in the EEA, which is primary legislation and not subordinate legislation, as is the case with the Regulations and the Code.

3 South African case law

In *SA Chemical Workers Union v Sentrachem Ltd*[7] the applicants alleged that the respondent discriminated against its black employees by paying them less than their white counterparts who were employed on the same grade or engaged in the same work. The Industrial Court held that wage discrimination based on race or any other difference other than *skills* and *experience*[8] was an unfair labour practice. The Industrial Court found that the respondent acknowledged the wage discrimination as alleged and committed itself to remove it. As a result thereof, the Industrial Court ordered the respondent to remove the wage discrimination based on race within a period of six months.[9] It is clear that the principle of equal remuneration for equal work was recognised in this case.[10] It is further clear that the Industrial Court considered *skills* and *experience* to be objective and fair factors upon which to pay black employees less than their white counterparts.[11]

In *National Union of Mineworkers v Henry Gould (Pty) Ltd*[12] the applicant alleged that the respondent's refusal to implement wage increases to union members retrospectively constituted an unfair labour practice. The Industrial Court remarked that as an abstract principle, it is self-evident that equals should be treated equally. It further remarked that employees having the same seniority and in the same job category should receive the same terms and conditions of employment unless there are good and compelling reasons to differentiate between them. The Industrial Court ordered the

7 *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 (IC) (hereafter referred to as "*Sentrachem I*"). This case was heard in terms of s 46(9) of the *Labour Relations Act* 28 of 1956, which has been repealed.

8 Emphasis added. The Industrial Court in its order at *Sentrachem I* 439H also refers to length of service in the job as a fair criterion for paying black employees less than their white counterparts.

9 *Sentrachem I* 412F, 429F, 430E-F, 439H.

10 Cohen 2000 *SA Merc LJ* 260 has stated that the principle of equal pay for equal work was established in this case.

11 Emphasis added.

12 *National Union of Mineworkers v Henry Gould (Pty) Ltd* 1988 9 ILJ 1149 (IC) (hereafter referred to as "*Henry Gould*"). This case was heard in terms of s 46(9) of the *Labour Relations Act* 28 of 1956 which has been repealed.

respondent to pay the union members the relevant amount of wages.[13] It regarded *seniority* as a fair and objective factor to pay different wages.[14]

In *Sentrachem Ltd v John*,[15] the High Court noted that it was common cause between the parties that a practice in which a black employee is paid a lesser wage than his white counterpart who is engaged in the same work whilst both have the same length of service, qualifications and skills constitutes an unfair labour practice based on unfair wage discrimination. The High Court remarked that this was the correct exposition of the law.[16] This was a review application against the award made in *Sentrachem I* regarding the wage discrimination based on race. This award was set aside by the High Court for lack of an evidential basis to make the award.[17] The High Court regarded *length of service*, *qualifications* and *skills* as fair and objective factors in law to pay different wages.[18]

In *Mthembu v Claude Neon Lights*,[19] the respondent instructed its local management to evaluate each employee and make recommendations as to whether the employee should receive an increase in pay based on merit. Local management decided that two employees should not receive a merit increase. This decision gave rise to the application. The Industrial Court held that discrimination was absent and that it would not be in the interests of employers or employees to order that an employer is not entitled to differentiate between employees based on their productivity. It further held that an employer is entitled to reward an employee with a merit increase as that increases productivity.[20] It is clear from this case that the Industrial Court regarded *productivity* as a fair and objective factor for paying different wages.[21]

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13 *Henry Gould* 1150E, 1158A-B, 1161I.

14 Emphasis added.

15 *Sentrachem Ltd v John* 1989 10 ILJ 249 (WLD) (hereafter referred to as "*Sentrachem II*").

16 Campanella 1991 *ILJ* 29 has stated that the principle of equal pay for equal work was cemented in this case.

17 *Sentrachem II* 259B-C, 250I, 259D, 263J.

18 Emphasis added.

19 *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC) (hereafter referred to as "*Mthembu*"). This case was heard in terms of s 46(9) of the *Labour Relations Act* 28 of 1956, which has been repealed.

20 *Mthembu* 423B-C, 423E-G.

21 Emphasis added. See Campanella 1991 *ILJ* 27, who suggested that the presiding officer in *Mthembu's* case regarded productivity as a ground of justification to pay differentiation; Campanella 1991 *ILJ* 29-30 has stated that equal pay for equal work is a crucial element in order to achieve a non-discriminatory policy, and employers should not labour under the misapprehension that productivity is a universally fair

In *TGWU v Bayete Security Holdings*[22] the applicant admitted that he was not aware of the nature of the work performed by his comparator; neither was he aware of his comparator's educational qualifications or experience. The Labour Court remarked that the applicant expected it to infer that he was discriminated against on the ground of race on the basis that he was black and earned R1 500 whilst his white comparator earned R4 500. The Labour Court held that the applicant had not succeeded in proving that he had been discriminated against. It further held that the mere difference in pay between employees does not in itself amount to discrimination. The Labour Court remarked that discrimination takes place when two similarly circumstanced employees are treated differently on the prohibited grounds. It further remarked that responsibility, expertise, experience, skills and the like could justify pay differentials. The application was consequently dismissed.[23] The Labour Court regarded *responsibility*, *expertise*, *experience*, *skills* and *the like* as fair and objective factors for paying different wages.[24]

In *Heynsen v Armstrong Hydraulics (Pty) Ltd*[25] the applicant (a quality control inspector) alleged that he was discriminated against on the basis of race in that he earned less than his co-employees (quality control inspectors) who were part of the bargaining unit and who were weekly paid. The applicant did not belong to the bargaining unit and was monthly paid but the work performed was the same as that of his co-employees. The applicant sought an order directing the respondent to remunerate him on an equal pay for equal work basis. The Labour Court noted that there were differences in the terms and conditions of employment with regard to weekly paid and monthly paid employees.[26] It further noted that monthly paid employees were entitled to certain benefits which hourly paid employees did not enjoy. The Labour Court held that it would not be fair if employees who were not part of the bargaining unit were to benefit from that unit while they still enjoyed benefits which were not shared by the bargaining unit. The Labour Court noted that according to the ILO, collective bargaining is not a

ground of differentiation, because its fairness is dependent on objective criteria which should be applied objectively.

22 *TGWU v Bayete Security Holdings* 1999 4 BLLR 401 (LC) (hereafter referred to as "*TGWU*"). This matter came before the Labour Court in terms of item 2(1)(a) of Schedule 7 of the LRA, which has since been repealed.

23 *TGWU* paras 5, 4, 7, 10.

24 Emphasis added.

25 *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC) (hereafter referred to as "*Heynsen"*).

26 *Heynsen* paras 1, 3-4, 6, 10-11.

justification for pay discrimination.[27] It cautioned that this rule was compelling in an ideal society and should not apply rigidly in South African labour relations due to the fact that collective bargaining was a hard-fought right for employees. The Labour Court characterised the applicant's complaint as wanting to have his cake and eat it. It found that insofar as their might be discrimination, it was not unfair, based on the facts. The application was consequently dismissed.[28] The Labour Court regarded *collective bargaining* as a possible fair and objective factor for paying different wages.[29]

In *Ntai v SA Breweries Ltd*[30] the applicants, black people, alleged that their employer committed unfair discrimination based on race in that it paid them a lower salary than their white counterparts whilst all of them were engaged in the same work or work of equal value. The applicants sought an order that their employer pay them a salary equal to that of their white counterparts. The respondent admitted that there was a difference in the salaries but denied that the cause of the difference was based on race. The respondent attributed the difference in pay to a series of performance-based pay increments, the greater experience of the comparators, and their seniority. The Labour Court accepted that the applicants had made out a *prima facie* case but noted that they still bore the overall onus of proving that the difference in pay was based on race. It found that the applicants had failed to prove on a balance of probabilities that the reason for the different salaries was based on race. The application was consequently dismissed.[31] The Labour Court remarked that the respondent had no legal duty to apply affirmative action measures and somehow increase the salaries of the applicants. It further remarked that the application of an affirmative action measure was a defence which could be relied upon by an employer and did not constitute a right which an employee could use. The Labour Court noted that indirect discrimination exists when an ostensibly

27 *Heynsen* refers to s 111 of the Directions of the ILO. It is submitted that this should be read as referring to art 2(e) of the *Discrimination (Employment and Occupation) Recommendation* 111 of 1958.

28 *Heynsen* paras 8, 12-13, 15, 17-18.

29 Emphasis added. Also see *Larbi Ordam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC) para 28, wherein the Constitutional Court held that an agreed regulation whi ch unfairly discriminates against a minority will not constitute a ground of justification; and *Jansen van Vuuren v South African Airways (Pty) Ltd* 2013 10 BLLR 1004 (LC) paras 48-50, wherein the Labour Court held that a collective agreement cannot justify unfair discrimination.

30 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC) (hereafter referred to as "*Ntai*"). This matter came before the Labour Court in terms of item 2(1)(a) of Schedule 7 of the LRA, which has since been repealed.

31 *Ntai* paras 2-3, 5, 25, 21, 57, 61, 90.

neutral requirement adversely affects a disproportionate number of people from a protected group and it may also arise in the case of equal pay for work of equal value.[32] It further noted that the use of ostensibly neutral requirements such as *seniority* and *experience* in the computation of pay could have an adverse impact on employees from the protected group if it was proved that such factors affected the employees as a group disproportionately when compared with their white counterparts who performed the same work.[33]

In *Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA*[34] the second applicant alleged that the respondent committed unfair discrimination based on the absence of family responsibility in that employees with family responsibility (dependent spouses and children) received a higher total guaranteed remuneration than employees without family responsibility and this violated the principle of the right to equal pay for equal work or work of equal value. The Labour Court noted that the international community acknowledged the fact that workers with family responsibilities constituted a vulnerable group and are deserving of protection. Additional remuneration for these employees was endorsed and encouraged in terms of both national and international law.[35] The Labour Court agreed with the respondent's submission that the definition of family responsibility made it clear that only those employees with dependants may utilise section 6(1) on the ground of family responsibility. The applicants could therefore not claim unfair discrimination on the basis of the absence of family responsibility, which is the corollary of the listed ground of family responsibility. The claim was consequently dismissed.[36] The Labour Court regarded the *absence of family responsibility* as a justification for paying different wages.[37]

In *Mangena v Fila South Africa (Pty) Ltd*[38] the applicant, a black male, alleged that the respondent discriminated against him on the ground of race in that it paid his chosen comparator, a white female, a higher salary even though the work performed by both of them was the same or alternatively

32 *Ntai* paras 85-86.
33 *Ntai* paras 79-80.
34 *Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA* 2007 1 BLLR 55 (LC) (hereafter referred to as "*Co-operative Worker Association*").
35 *Co-operative Worker Association* paras 6, 8, 42, 51.
36 *Co-operative Worker Association* paras 47, 36, 60.
37 Emphasis added.
38 *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) (hereafter referred to as "*Mangena*").

of equal value.[39] The Labour Court found that the applicant had an exaggerated view of the nature of the work performed by him and it rejected his evidence as to the nature of the work performed by both him and the comparator and instead accepted the respondent's version in this regard. It found that the applicant had failed to establish that the work performed by him and the comparator was the same/similar.[40] The Labour Court then noted that the applicant had not pleaded a claim of equal pay for work of equal value. The applicant argued that the Court could take a view on the facts before it as to the relative value of the respective work. The Labour Court remarked that to the extent that the issue of relative value was self-evident, the work which the applicant was engaged in was of considerably less value than that performed by the comparator taking into account the *demands made*, *levels of responsibility* and *skills* in relation to both jobs. It stated that an applicant claiming equal pay for work of equal value must lay a proper factual foundation of the work performed by himself and that of his chosen comparator to enable the court to make an assessment as to what value should be attributed to the work. This factual foundation might include evidence of *skill*, *effort*, *responsibility* and *the like* in relation to the work of both the claimant and the comparator.[41]

In *Duma v Minister of Correctional Services*[42] the applicant (Duma) launched her claim for equal pay for the same work in the Labour Court. The matter was eventually set down for decision before the Labour Court in terms of a stated case. She was appointed to the post of Senior Correctional Officer: Manager: Legal Services at Voorberg in the Western Cape. This position was advertised at salary level 8 and Duma filled this post with effect from 1 August 2006. According to the stated case, it was agreed that the Manager: Legal Services positions in Limpopo, Mpumalanga, North-West and Kwazulu-Natal, *inter alia*, were on salary level 9. It was further agreed that this position should be at salary level 9 in terms of the Department's organisational structure, job description and title. It was agreed that there were disparities between various employees performing work with the same job description at different levels of pay. Duma brought this disparity to the attention of the Department, in particular, that her salary level be moved

39 *Mangena* paras 2, 4. This claim represents the first part of the claim in the case which relates to the applicant, Shabalala. The second and third parts of the claim will not be dealt with.

40 *Mangena* para 14.

41 *Mangena* para 15.

42 *Duma v Minister of Correctional Services* 2016 6 BLLR 601 (LC) (hereafter referred to as "*Duma*").

from level 8 to level 9, but no action was taken by the Department to correct it.[43]

The Labour Court noted that Duma relied on section 6(1) of the EEA for her claim of unfair discrimination relating to equal pay. She relied upon the unlisted ground of "geographical location". The Court held that the basis for the differentiation which was the fact that Duma was employed by the Department in one province and not another, appeared to be entirely arbitrary. The Labour Court noted that the amended section 6(1) of the EEA, which was not applicable in this case, was amended to prohibit unfair discrimination on *any other arbitrary ground*. It held further that the use of the ground of geographical location as a basis for paying employees in one province less than employees in another province for the same work has the ability to impair the dignity of those employees in a manner comparable to the listed grounds and amounts to discrimination. The Labour Court stated that the respondents' baldly denied that it unfairly discriminated against Duma. They failed to explain the reason as to why Senior Correctional Officers in the Western Cape were on a lower salary level than their counterparts in other provinces. The Court held that the respondents were more concerned with the remedy that the applicant sought and whether it was competent for the Court to grant same.[44]

The Labour Court held that Duma had successfully proved that she was unfairly discriminated against with regard to her pay. It made the following compensation orders: (a) the respondents were ordered to pay Duma an amount equivalent to the difference between the remuneration she had received from August 2009 to the date of the order and the remuneration she would have received during that period had she been graded on level 9; and (b) to adjust her monthly salary to align with the current remuneration entitlement of an employee who had her job description and who was on salary level 9.[45]

In *Pioneer Foods (Pty) Ltd v Workers Against Regression*[46] the Labour Court heard an appeal in terms of section 10(8) of the EEA against an arbitration award of the Commission for Conciliation, Mediation and Arbitration (CCMA) in which the Commissioner found that paying newly appointed drivers at an 80% rate for the first two years of employment as

43 *Duma* paras 1, 6, 8.
44 *Duma* paras 19, 21, 23.
45 *Duma* paras 25-26.
46 *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 9 BLLR 942 (LC) (hereinafter referred to as "*Pioneer Foods*")

opposed to the 100% rate paid to drivers working longer than two years in terms of a collective agreement amounted to unfair discrimination in pay. The CCMA in essence regarded the factor of seniority as a ground of discrimination as opposed to a ground justifying pay differentiation. The issue before the court was the interpretation of section 6(4) of the EEA, and in particular the issue of the factor of seniority operating as a ground of discrimination. The Workers against Regression ("union") wanted their members to be remunerated at the same rate as those employees who had been working for longer than two years at the appellant. They thus sought a 20% increase in their members' remuneration to bring it in line with the comparator employees' rate.[47]

The appellant, in accordance with a collective agreement concluded with the Food and Allied Workers Union ("FAWU"), pays newly appointed employees for the first two years of their employment at 80% of the rate paid to its longer serving employees, after which the rate would be increased to 100%. The Commissioner found that by applying this to its employees, the appellant had unfairly discriminated against them. He ordered that the rate of remuneration be changed to 100% for newly appointed employees and that damages be paid to the members of the union. The Labour Court found that the equal pay framework regards the factor of seniority as a ground which justifies pay differentiation and the Commissioner had misconceived the law by regarding it as a ground upon which pay discrimination was committed. The Labour Court found that the Commissioner determined the arbitration unfairly and he had made an award that was contrary to the case argued by the union.[48]

The Labour Court found that the Commissioner's approach was that it amounts to unfair discrimination for the appellant to pay a newly appointed employee who was previously employed by a labour broker at a lower rate than the rate paid to existing long-service employees, irrespective of how short the period of previous employment with the labour broker was. The lower rate of remuneration for newly appointed employees as contained in the collective agreement between FAWU and the appellant came about as a result of FAWU's persuading the appellant to reduce the extent to which it was using the services of various forms of precarious employees, including employees supplied by labour brokers. FAWU also proposed the implementation of a scale that showed the difference between employees who had newly started working and long-serving employees. The 80%

47 *Pioneer Foods* paras 1-5.
48 *Pioneer Foods* paras 5, 32-33, 36-37, 57.

scale/rate was applied to all new employees from outside the company and it ceased to operate after two years of service. The Labour Court found that the differentiation complained of was not irrational, was not based on an arbitrary unlisted ground, and was not unfair. The appeal was thus upheld.[49]

3.1 The factors emerging from the South African case law

It is clear from the aforementioned analysis of the case law that the following factors have been regarded as fair and objective (neutral) for justifying pay differentials: (a) skills;[50] (b) experience;[51] (c) seniority;[52] (d) length of service;[53] (e) qualifications;[54] (f) productivity;[55] (g) responsibility;[56] (h) collective bargaining (agreements);[57] (i) absence of family responsibility;[58] and (j) objective job evaluation methods.[59]

4 Grounds of Justification from the ILO

The *Equal Remuneration Convention*[60] does not set out the defences/grounds of justification to equal pay claims, but states that differential rates between workers that are determined by an objective appraisal which is free from discrimination based on sex shall not be

49 *Pioneer Foods* paras 44, 46-48, 76.

50 *Sentrachem I* 429F; *Sentrachem II* 259B-C; *TGWU* para 7.

51 *Sentrachem I* 429F; *TGWU* para 7; *Ntai* para 80.

52 *Henry Gould* 1158A-B; *Ntai* para 80; *Pioneer Foods* para 57; Landman 2002 *SA Merc LJ* 354 has stated that the basing of pay differentials on seniority is a recognised defence; Meintjes-Van Der Walt 1998 *ILJ* 30 relying on foreign law has stated that a *bona fide* seniority system is an acceptable ground of justification to pay differentials.

53 *Sentrachem II* 259B-C.

54 *Sentrachem II* 259B-C.

55 *Mthembu* 423E-G; Landman 2002 *SA Merc LJ* 353-354 referring to s 32 of the *Ontario Employment Standards Act* of 1990 has stated that merit has been accepted as a ground of justification for pay differentials; Meintjes-Van Der Walt 1998 *ILJ* 30 relying on foreign law has stated that a merit system based on objective criteria is an acceptable ground of justification to pay differentials. It is clear from *Mthembu's* case that merit is linked to productivity.

56 *TGWU* para 7.

57 *Heynsen* paras 12-13, 17; Landman 2002 *SA Merc LJ* 351 has stated that an employer can attempt to rely on a collective agreement that provides for discriminatory wages as a ground of justification for pay differentials but this reliance is unlikely to succeed; Grogan *Employment Rights* 230 relying on *SA Union of Journalists v South African Broadcasting Corporation* 1999 20 ILJ 2840 (LAC) has stated that collective bargaining agreements with different unions which result in pay differentials are permissible.

58 *Co-operative Worker Association* paras 36, 47.

59 *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) para 106; Pieterse 2001 *SALJ* 17 has suggested that the use of specific objective job evaluation methods will prevent perpetuating disadvantage.

60 *Equal Remuneration Convention* 100 of 1951.

considered to be contrary to the principle of equal pay for equal work or work of equal value.[61] The *Equal Remuneration Convention* does not set out the defences/grounds of justification which may be raised in an equal remuneration claim, neither does the Equal Pay Guide[62] set it out. What is clear from the ILO, however, is that the use of objective appraisals (job evaluation methods) or objective factors to determine the value of the work can (successfully) be raised as a defence to an equal pay claim, as it is not contrary to the principle of equal pay.

5 *Equality Act* of the United Kingdom

In the United Kingdom, a claimant may approach the employment tribunal with an equal pay claim.[63] The tribunal must then determine whether there has been unequal pay in the particular case. An employer faced with a *prima facie* case of unequal pay may raise the *genuine material factor* defence. The employer has the onus of proving the defence on a balance of probabilities. The successful raising of the defence means that the difference in the terms and conditions of employment is due to a *material factor* which is not the difference of sex.[64] Section 69 of the *Equality Act*[65] sets out the genuine material factor defence in the following subsections as follows:

> (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which-
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
>
> (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put

61 Article 3 of the *Equal Remuneration Convention* 100 of 1951.

62 Oelz, Olney and Manuel *Equal Pay Guide*.

63 Smith and Baker *Employment Law* 372.

64 Smith and Baker *Employment Law* 366. Item 8 of the *Equal Pay Statutory Code of Practice to the Equality Act* of 2010 states that "Historically, women have often been paid less than men for doing the same or equivalent work and this inequality has persisted in some areas." The Code further states that the provisions relating to equal pay and sex discrimination in the *Equality Act* of 2010 are intended to ensure that pay and other employment terms are determined without sex discrimination or bias and even though the Code relates to equal pay between men and women, pay systems may be challenged on grounds of race, age or other protected characteristics under the *Equality Act* of 2010 (items 9 and 11).

65 *Equality Act* of 2010 ("EA").

> at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.[66]

It is clear from subsection (1)(a) of section 69 that if the reason for treating A (the aggrieved employee) and B (the comparator) differently in relation to their terms of employment is not based on sex, then this is a complete defence to an equal pay claim. Subsection (1)(b) of section 69 permits discrimination in terms and conditions of employment based on sex if the reason for doing so constitutes a proportionate means of achieving a legitimate aim. At first blush this section seems to be counterproductive to what the EA seeks to achieve, but this is clarified in subsection (3) of section 69, which states that:

> [f]or the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

Section 131(6)(a)-(b) of the EA provides that a job evaluation study that is not based on a system that discriminates on the ground of sex and that is reliable constitutes a defence to an equal pay claim. Item 42 of the Equal Pay Code[67] states that:

> [i]f a job evaluation study has assessed the woman's job as being of lower value than her male comparator's job, then an equal value claim will fail unless the Employment Tribunal has reasonable grounds for suspecting that the evaluation was tainted by discrimination or was in some other way unreliable.

5.1 Grounds of justification

It is clear from the above analysis of the EA that the following are regarded as defences to an equal pay claim:

(a) the genuine material factor defence[68] and;

(b) a job evaluation study that is not based on a system that discriminates on the ground of sex and that is reliable.[69]

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66 Section 69(1)-(2) of the EA.

67 *Equal Pay Statutory Code of Practice to the Equality Act* of 2010 ("Equal Pay Code").

68 Section 69 of the EA.

69 Section 131(6)(a)-(b) of the EA. Item 42 of the Equal Pay Code states that "[i]f a job evaluation study has assessed the woman's job as being of lower value than her male comparator's job, then an equal value claim will fail unless the Employment Tribunal has reasonable grounds for suspecting that the evaluation was tainted by discrimination or was in some other way unreliable".

5.2 The case law

It should be noted that the case law decided under the repealed *Equal Pay Act*,[70] which provided for the right to equal pay for work of equal value, and the defences thereto will be analysed below, in addition to the case law decided under the EA. These cases, whilst decided under repealed legislation, are instructive and provide an invaluable insight as to how the courts have (previously) dealt with the specific issues relating to equal pay claims and how they might (possibly) deal with these issues in future litigation. Case law decided under the repealed EPA cannot be disregarded as it forms part of the jurisprudence relating to equal pay claims. It should further be noted that the case law decided by the European Court of Justice and the Northern Ireland Court of Appeal will be referred to, but only to a limited extent. Reference to these cases under the analysis of the case law in the United Kingdom should not be surprising, as the tribunals and courts in the United Kingdom readily make reference to the decisions of these courts in their judgments.

5.2.1 Case law dealing with the grounds of justification to equal pay claims

In *Secretary of State for Justice v Bowling*[71] the respondent was employed by the Prison Service, which fell under the appellant, as a service desk user support team customer service adviser. The respondent claimed in the Employment Tribunal that she was doing like work to that of her chosen male comparator, but was paid less than him. The male comparator held the same post as the respondent but started on a salary of £15, 567 as opposed to the respondent who started on £14, 762. The difference between the starting salaries was due to the comparator being appointed on spinal point 3 in terms of the appellant's salary scale and the respondent's being appointed on spinal point 1. The appellant argued that the reason for this difference was due to the fact that the comparator had more background and experience than the respondent. The Employment Tribunal accepted this explanation in respect of the difference in pay that had existed at the time of appointment. The Employment Tribunal, however, held that this explanation could not apply to the period where the respondent and the comparator had achieved the same appraisal rating, because at that stage the reason of skill and experience had ceased to be a material factor which could be relied on for paying different wages for like work. It

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70 *Equal Pay Act* of 1970 ("EPA"). This Act was the predecessor to the EA in respect of equal pay claims.

71 *Secretary of State for Justice v Bowling* [2012] IRLR 382 EAT.

therefore allowed the respondent's claim in part.[72] On appeal, the Employment Appeal Tribunal accepted the appellant's argument that "it is in the nature of an incremental scale that where an employee starts on the scale will impact on his pay, relative to his colleagues', in each subsequent year until they reach the top". The Employment Appeal Tribunal accepted that a differential was built into the pay of the respondent once the comparator had been appointed two points above the respondent in terms of the salary scale and if the original differential was free from sex discrimination then it follows that the differentials in later years too were free from sex discrimination. The appeal was consequently allowed.[73] Where two employees doing like work are appointed on different levels of a salary scale due to skill and experience which is free from unfair discrimination, then the difference in pay in later years will not amount to unfair discrimination. This is only logical. If one employee is appointed on a higher scale than the other and both employees perform well, then the one employee will almost always receive higher wages than the other. It is

72 *Secretary of State for Justice v Bowling* [2012] IRLR 382 EAT paras 1, 2.1 - 2.3, 5.

73 *Secretary of State for Justice v Bowling* [2012] IRLR 382 EAT paras 6-7, 11. In *Skills Development Scotland v Buchanan* [2011] EqLR 955 EAT para 20, the Employment Appeal Tribunal held that "in an equal value case, if the employer establishes a genuine explanation - not a sham, fraud or pretense - for the variation in the contracts and that explanation does not involve sex, then he need not go further. In particular, he need not show objective justification. If the employer proves a gender neutral explanation for the difference in pay, that is sufficient. In an individual case, it may seem that the explanation for the difference demonstrates that it is unfair or unjustified on moral grounds but that is not relevant". In *Glasgow City Council v Marshall* [2000] IRLR 272 HL 276, the House of Lords made the following comments with regard to an employer rebutting a presumption of sex discrimination relating to unequal pay: "In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretense. Secondly, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case". In *Coventry City Council v Nicholls* [2009] IRLR 345 EAT para 12, the Employment Appeal Tribunal held that an employer relying on a genuine material factor defence must demonstrate what that factor is and that the factor is: "(a) A genuine reason and not a sham or a pretense, which existed and was known to the employer at the date that the pay was fixed and which continues to the point of the hearing; (b) That the less favourable treatment is due to this reason. The factor must be a material factor and must be causative, not just justificatory; (c) The reason must not be the difference of sex. This can include direct or indirect discrimination; (d) The factor relied upon is a significant and relevant difference between the woman's case and the man's case; (e) If the factor relied upon is indirectly discriminatory on the grounds of sex, that reliance upon it is justified".

submitted that this case may apply *mutatis mutandis* to a claim of equal pay for work of equal value and is not confined to equal pay for like work only.

In *Council of the City of Sunderland v Brennan*[74] female employees (caterers, cleaners, carers, school support staff) of the appellant claimed that their work was rated as equivalent or was of equal value to that of their male comparators (gardeners, road sweepers, drivers and refuse collectors) but they had not received bonus payments which had been received by their comparators. The appellant argued in the Employment Tribunal that the reason for non-payment was linked to productivity. The Tribunal held that "the bonus schemes enjoyed by the predominantly male groups "had long ceased to have anything to do with productivity." The appellant aggrieved by this finding unsuccessfully appealed the same to the Employment Appeal Tribunal. The England and Wales Court of Appeal held that the fact that the ultimate withdrawal of the bonus system had not impacted on productivity in the sense of its being decreased led to a "permissible inference that the bonus system had long since ceased to relate to productivity". The Appeal was accordingly dismissed.[75] Pay differentials between the sexes cannot be justified in terms of a bonus system which has no bearing on productivity, which was the factor which it sought to reward. There must be a link between productivity and the bonus system.

In *Redcar & Cleveland Borough Council v Bainbridge* (No 2)[76] the England and Wales Court of Appeal dealt with three consolidated appeals concerning questions of law relating to claims of equal pay and the scope of the defences. Only the law relating to the scope of collective agreements as a defence to equal pay claims will be considered. The Court of Appeal held that the fact that different jobs have been subject to separate collective bargaining processes can be a complete defence to an equal pay claim. It

74 *Council of the City of Sunderland v Brennan* [2012] IRLR 507 EWCA.

75 *Council of the City of Sunderland v Brennan* [2012] IRLR 507 EWCA paras 1, 6-7, 10, 27, 42. In *Cumbria County Council v Dow* (No 1) [2008] IRLR 91 EAT paras 130, 133, 135-136, the Employment Appeal Tribunal held that the appellant's productivity (bonus) scheme did not achieve a legitimate objective because the appellant had failed to apply it rigorously and this resulted in the payments made according to the scheme forming part of the basic wage. The Employment Appeal Tribunal further held that a Tribunal is entitled to seek "evidence that productivity had increased as a result of improvements in the performance of the workers themselves". It is clear from this case that a bonus scheme that is intended to reward productivity must do just that. Where the scheme ceases to reward productivity then it loses its status of being a legitimate means of improving productivity and will fail as a ground justifying pay differentials.

76 *Redcar & Cleveland Borough Council v Bainbridge* (No 2) [2008] IRLR 776 EWCA.

qualified this, however, by stating that collective bargaining can be a defence only where the reason for the pay differential is the separate collective bargaining and not the difference of sex. It held that where separate bargaining has the effect that group of a particular sex (females) of similar proportions earns less than another group of a particular sex (males) of similar proportions, this could constitute a complete defence to an equal pay claim which is not sex-tainted. It further held that this would not apply where there is a marked difference between the two groups, because the difference would constitute evidence from which a Tribunal could infer that the process of the separate bargaining was tainted by sex unless the employer furnishes a different explanation. It concluded by stating that "the fact of separate collective bargaining would not, of itself, be likely to disprove the possibility of sex discrimination".[77] Where separate collective bargaining is raised by the employer as a justification to pay differentials between the sexes, the employer has to show that it was not sex-tainted. This applies to a scenario where there is a marked difference in the sex of the groups because a Tribunal will be entitled to infer that the process was sex-tainted. It is further clear from this case that where the pay differentials apply to two different groups of similar proportions then there is no inference to be drawn that the process was or is sex tainted.

In *Benveniste v University of Southampton*[78] the appellant had taken up employment with the respondent in 1981. It was common cause that the salary offered to the appellant was less than what she would have been offered had there been no financial constraints on the respondent in 1981. The appellant accepted the offer of employment on the understanding that she would be paid the salary that she would have been entitled to had there been no financial constraints on the respondent, once the constraints ceased to exist. The respondent's financial constraints came to an end in 1982. The respondent undertook to increase the appellant's salary slightly by means of pay increments but the appellant found this to be unsatisfactory. There were several correspondences between the appellant

77 *Redcar & Cleveland Borough Council v Bainbridge* (No 2) [2008] IRLR 776 EWCA paras 2-3, 181, 198. In *British Road Services Ltd v Loughran* [1997] IRLR 92 NICA para 76, the Northern Ireland Court of Appeal held that if one of the groups subject to separate collective bargaining is made up of predominantly females then a Tribunal should ascertain the reason for the wage difference, in particular whether it is due to sex discrimination. In a dissenting judgment McCollum J held that "[i]n my view, in the circumstances of this case, the separate pay structures were capable of amounting to a material factor free of the taint of sex discrimination, as the percentage of women in the less well paid group was not so high as to lead inevitably to a finding of indirect discrimination" (para 44).

78 *Benveniste v University of Southampton* [1989] IRLR 123 CA.

and the respondent regarding her low salary as compared with that of her four male comparators. This resulted in the appellant being dismissed by the respondent. The appellant claimed equal pay for like work in the Industrial Tribunal. This claim was dismissed. The appellant then appealed to the Employment Appeal Tribunal, which appeal was also dismissed. The Court of Appeal held that once the financial constraints on the respondent came to an end in 1982, the reason for paying the appellant a lower salary disappeared. It further held that "… [it was] not persuaded that it can be right that the appellant should continue to be paid on a lower scale once the reason for payment at the lower scale has been removed". It reasoned that the material difference between the rate of pay between the appellant and that of her comparators had evaporated. It noted that there was no evidence to the effect that the respondent was under continuing financial constraints. The Court of Appeal allowed the appeal and remitted the case to the Industrial Tribunal for the determination of a suitable remedy.[79] Financial constraints can justify pay differentials. This, however, is limited to the existence or continuation of the financial constraints. Once the financial constraints have ceased to exist then they lose their status as grounds to justify pay differentials. Where the financial constraints are of a continuing nature, then this can operate as a justification to pay differentials. The existence or continuation of the financial constraints must, however, be genuine.

In *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)*[80] the Northern Ireland Court of Appeal heard an appeal from the Industrial Tribunal by way of a stated case. The following question was posed in the stated case: "[w]as the tribunal correct in law to hold that the protection afforded by the material difference of red-circling[81] is not time limited?" The Court of Appeal held that the length of time in respect of which pay differentials had endured due to red-circling is not irrelevant to the issue of whether it can continue to be a general material factor. It explained that in order for red-circling to qualify as a general material factor defence to pay differentials, the reason for its existence or continuation at the time the pay differential is being challenged is of cardinal importance and must be examined. It further held that "[i]t is wrong to assume that because it was right to institute the system,

79 *Benveniste v University of Southampton* [1989] IRLR 123 CA.paras 4-5, 10, 12, 14, 30-32.

80 *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)* [2009] IRLR 132 NICA.

81 Red-circling is a pay protection measure which protects an employee's salary even in circumstances where his duties have lessened (*Fearnon v Smurfit Corrugated Cases Lurgan (Limited)* [2009] IRLR 132 NICA para 3). Also see *Bury Metropolitan Council v Hamilton* [2011] IRLR 358 EAT, wherein the Employment Appeal Tribunal dealt with pay protection claims.

that it will remain right to maintain it indefinitely". The Court of Appeal answered the above question in the negative and allowed the appeal.[82] A defence to an equal pay claim cannot be valid in perpetuity without its validity being examined at the time when a claim of equal pay is made. It may be that the application is valid in perpetuity, but this must be proved at the stage when it is raised as a defence. Allowing the defence of red-circling to be valid in perpetuity because the reason for its initial implementation was justified would allow unscrupulous employers to rely on the defence even where the reason for the initial implementation of the red-circling had ceased to exist.[83]

In *Rainey v Greater Glasgow Health Board*[84] the appellant female was employed by the respondent as a prosthetist. She claimed equal pay to that of her chosen male comparator, who was also employed by the respondent as a prosthetist. The respondent had offered the comparator a higher starting salary (£6,680) than that offered to the appellant (£4,733). The respondent alleged that the higher starting salary was to attract the

82 *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)* [2009] IRLR 132 NICA paras 1-2, 12, 15, 17. In *Snoxell v Vauxhall Motors Ltd* [1977] IRLR 123 EAT, the female appellants were employed as inspectors of motor machine parts by the respondent. They claimed that they were being paid less than certain of their male counterparts who were red-circled, for doing the same work. The Industrial Tribunal dismissed their claims and upheld the defence of red-circling as raised by the respondent. The Employment Appeal Tribunal disagreed with the Tribunal and held that the inevitable conclusion on the evidence was that the female appellants would have been red-circled had they not been women. The appeal was allowed and the case was remitted to the Industrial Tribunal to determine the amount of arrear remuneration which the appellants were entitled to (*Snoxell v Vauxhall Motors Ltd* [1977] IRLR 123 EAT paras 11, 26, 52). In *United Buiscuits Ltd v Young* [1978] IRLR 15 EAT, the respondent, a female packing supervisor employed on day shift claimed that she was paid less than her male counterparts who were employed on night shift and were red-circled. She sought to be remunerated according to the amount paid to her male counterparts. The appellant's reliance on red-circling as the ground justifying the pay differentials was rejected by the Industrial Tribunal. The Employment Appeal Tribunal held that "where an employer seeks to discharge the *onus* which rests upon him under s.1(3) by what may be described as a 'red circle defence', he must do so under reference to each employee who it is claimed is within the circle. He must prove that at the time when that employee was admitted to the circle his higher remuneration was related to a consideration other than sex. It may be that in some cases he can rely upon a presumption that considerations which apply to existing members of the circle apply to subsequent intrants. But where, as here, these considerations are accepted as having eventually disappeared we consider that it is for the employer to establish by satisfactory evidence that this occurred after the latest intrant was accepted." The Employment Appeal Tribunal accordingly dismissed the appeal (*United Buiscuits Ltd v Young* [1978] IRLR 15 EAT paras 2-3, 8, 10).

83 *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)* [2009] IRLR 132 NICA para 12.

84 *Rainey v Greater Glasgow Health Board* [1987] IRLR 26 HL.

comparator to work for it. Unlike the comparator, the appellant was not offered employment whilst employed for a private company. The appellant's claim was dismissed by both the Industrial Tribunal and the Employment Appeal Tribunal. The main question before the House of Lords was whether the explanation furnished by the respondent for the pay differential constituted a general material factor defence which excluded the difference of sex. The House of Lords held that administrative efficiency could constitute a genuine material factor defence. It noted and agreed with the finding of the Industrial Tribunal that the new prosthetic service would not have been established timeously had it not been for the appointment of the comparator and others like him who were offered an amount of remuneration equal to that which they were receiving from the private company. It further held that the comparator was paid more because of the need of the respondent to attract him. It concluded that the respondent's explanation of the pay differential did amount to a genuine material factor defence. The appeal was accordingly dismissed.[85] Where there is a need by the employer to attract an employee to its business for legitimate reasons (administrative efficiency), this will amount to a defence which would justify consequent pay differentials.

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85 *Rainey v Greater Glasgow Health Board* [1987] IRLR 26 HL paras 2-3, 5, 8-9, 11, 18-22. In *Ratcliffe v North Yorkshire County Council* [1995] IRLR 439 HL, the respondent dismissed the female appellants and rehired them at a lower wage. The respondent alleged that it did this because it had to become tender competitive. The respondent had lost a tender to another company whose labour costs were substantially lower than those of the respondent. The Industrial Tribunal found that the need of the respondent to reduce the appellant's wages in order to compete with other companies may have been a material factor, but it was due to a factor based on the difference of sex. The Tribunal found in favour of the appellants and rejected the respondent's explanation as being a justification to the pay differentials. The Employment Appeal Tribunal overturned the decision of the Tribunal. The Court of Appeal upheld the decision of the Employment Appeal Tribunal. The House of Lords, however, agreed with the Industrial Tribunal and held that "[t]o reduce the women's wages below that of their male comparators was the very kind of discrimination in relation to pay which the Act sought to remove" (*Ratcliffe v North Yorkshire County Council* [1995] IRLR 439 HL 439-440). In *Albion Shipping Agency v Arnold* [1981] IRLR 525 EAT para 15, the Employment Appeal Tribunal held that "as a matter of common sense a change in the circumstances of the business in which the man and the woman are successively employed can (but not necessary will) constitute a 'material difference' between her case and his". In *British Coal Corporation v Smith; North Yorkshire County Council v Rattcliffe* [1994] IRLR 342 CA 344, the Court of Appeal held that "a "material factor" defence must fail if the employer cannot prove that the material factor relied upon was not tainted by sex". In *National Coal Board v Sherwin* [1978] IRLR 122 EAT 123 the Employment Appeal Tribunal held that "it is no justification for a refusal to pay the same wages to women doing the same work as a man to say that the man could not have been recruited for less".

In *Bilka-Kaufhaus GmbH v Weber von Hartz*[86] the European Court of Justice held that an employer may rely on objectively justified economic grounds for pay differentials. It further held that it is the task of the national court to determine whether the explanation furnished by the employer for the pay differentials constitutes objectively justified economic grounds. The Court noted that the measures adopted by the employer must be appropriate to achieving the economic objectives.[87] This case makes it clear that an employer may rely on economic grounds as a justification to pay differentials. It is the duty of the national court to ascertain whether the economic grounds relied on are genuine and achieve the objectives sought.

In *Wilson v Health & Safety Executive*[88] the England and Wales Court of Appeal was faced with the following questions relating to a service-related criterion which determined pay: "does the employer have to provide objective justification for the way he uses such a criterion, and, if so, in what circumstances?" The Court of Appeal noted that the use of service-related pay scales was common, and as a general rule an employer does not have to justify its decision to adopt them because the law acknowledges that experience allows an employee to produce better work. It held that an employer will have to justify the use of a service-related criterion in detail where the employee has furnished evidence which gives rise to serious doubts as to whether the use of the service-related criterion is appropriate to attain the criterion objective, which is the rendering of better work performance by employees with more years of service. In these circumstances an employer will have to justify the use of the service-related criterion by proving the general rule that an employee with experience produces better work and that this is evidenced in its workplace.[89] The use of a service-related pay criterion is as a general rule legitimate and will be a complete defence to an equal pay claim. It is only when an employee furnishes evidence which casts serious doubt on whether the criterion is appropriate to attain the criterion objective, which is the rendering of better work performance by employees with more years of service, that an employer will be called upon to justify the criterion by disproving the doubt. An employee may therefore challenge a service-pay criterion on this limited ground only.

86 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 ECJ.
87 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 ECJ para 36.
88 *Wilson v Health & Safety Executive* [2010] IRLR 59 EWCA.
89 *Wilson v Health & Safety Executive* [2010] IRLR 59 EWCA paras 1, 16.

In *Davies v McCartneys*[90] the appellant argued before the Employment Appeal Tribunal that the Industrial Tribunal committed an error by relying for its finding that the respondent had proved a material factor defence on factors which were also used in the assessment of the value of the work. The Employment Appeal Tribunal held that there is no limitation to the factors which an employer may rely on in proving a material factor defence. It stated that the important part of the defence was that it was based on a material factor which was genuine and not based on the difference of sex. It further held that:

> [h]owever, it is our view that an employer should not be allowed simply to say, 'I value one demand factor so highly that I pay more', unless his true reason for doing so is one which is found by the Tribunal to be reasonable and genuine and not attributable to sex.[91]

An employer may rely on the factors for assessing the value of work as a defence to a pay differential. In this instance, the factors for assessing the value of the work are capable of justifying the pay differential for genuine reasons which are not sex-tainted.

5.2.2 Grounds of justification

It is clear from the above analysis of the case law that the following are regarded as defences/grounds of justification to an equal pay claim: (a) the comparator was employed on a higher salary scale due to skill and experience;[92] (b) productivity is rewarded in terms of a bonus system;[93] (c) collective bargaining;[94] (d) financial constraints;[95] e) red-circling;[96] (f) administrative efficiency;[97] (g) economic grounds (reasons);[98] (h) service-pay criterion;[99] and (i) factors used for assessing the value of work in an equal value claim.[100]

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90 *Davies v McCartneys [*1989] IRLR 43 EAT.
91 *Davies v McCartneys [*1989] IRLR 43 EAT paras 11, 14-15.
92 *Secretary of State for Justice v Bowling* [2012] IRLR 382 EAT at para 5.2.1 hereof.
93 *Council of the City of Sunderland v Brennan* [2012] IRLR 507 EWCA at para 5.2.1 hereof.
94 *Redcar & Cleveland Borough Council v Bainbridge* (No 2) [2008] IRLR 776 EWCA at para 5.2.1 hereof.
95 *Benveniste v University of Southampton* [1989] IRLR 123 CA at para 5.2.1 hereof.
96 *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)* [2009] IRLR 132 NICA at para 5.2.1 hereof.
97 *Rainey v Greater Glasgow Health Board* [1987] IRLR 26 HL at para 5.2.1 hereof.
98 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 ECJ at para 5.2.1 hereof.
99 *Wilson v Health & Safety Executive* [2010] IRLR 59 EWCA at para 5.2.1 hereof.
100 *Davies v McCartneys* [1989] IRLR 43 EAT at para 5.2.1 hereof.

6 The Statutory Grounds of Justification in terms of the *Employment Equity Act*

The EEA refers to two grounds of justification to a claim of unfair discrimination, namely affirmative action and the inherent requirements of the job.[101] It should be noted that neither ground of justification in the context of equal pay claims has come before the South African courts. It is thus apposite to analyse the grounds of justification in the context of equal pay claims. It is prudent to deal first with the authorities which have differing views regarding the suitability of affirmative action and the inherent requirements of the job to operate as grounds of justification to an equal pay claim. Thereafter, affirmative action and the inherent requirements of the job will be analysed in the context of equal pay claims in an attempt to ascertain whether or not they constitute suitable grounds of justification.

In *Ntai* the Labour Court, dealing with an equal pay claim, remarked *obiter* that the respondent had no legal duty to apply affirmative action measures and somehow increase the salaries of the applicants. The Labour Court further remarked that the application of an affirmative action measure was a defence which could be relied upon by an employer and does not constitute a right which an employee could utilise.[102] It is clear from the *obiter* remarks made, that the Labour Court regarded affirmative action as a suitable defence to an equal pay claim.

Meintjes-Van der Walt has suggested that a pay differential in the context of pay discrimination should not be justified on the grounds of affirmative action as there are more constructive ways in which an affirmative action plan could be utilised to address past inequalities without implementing new differentials.[103] The reason for the suggestion that affirmative action is not suitable as a ground of justification to an equal remuneration claim is based on the view that an affirmative action plan could be used more fruitfully elsewhere.

Landman has suggested that affirmative action is a suitable ground of justification to an equal pay claim. He has further suggested that when affirmative action is applied in the context of equal pay claims, it may be that designated employees are paid more than able-bodied white males, who are the only persons who do not belong to a designated group. Whether an employer may discriminate within the designated groups by applying

101 *Davies v McCartneys* [1989] IRLR 43 EAT at para 5.2.1 hereof.
102 *Ntai* paras 85 - 86.
103 Meintjes-Van Der Walt 1998 *ILJ* 30.

affirmative action measures is a vexed question. With regard to the inherent requirements of the job, Landman has suggested that the justification to equal pay claims on this ground is possible in theory.[104]

Du Toit *et al* have suggested that it is difficult to imagine circumstances where either affirmative action or the inherent requirements of the job could be applicable as grounds of justification to pay discrimination on a prohibited ground between employees performing work of equal value.[105] Cohen has stated that neither the defence of affirmative action nor the inherent requirements of the job applies directly to pay discrimination.[106] Pieterse has suggested that pay-equity legislation should include specific defences to pay-equity claims and that it would be beneficial if the legislation specified the interface between pay equity principles and affirmative action structures.[107] Hlongwane has stated that the EEA does not expressly provide for defences to pay discrimination, and it is thus difficult to reconcile how either the defence of affirmative action or the inherent requirements of the job could justify pay discrimination committed on one of the grounds referred to in section 6(1) of the EEA.[108]

It is clear from the above that there are two views regarding the suitability and applicability of affirmative action and the inherent requirements of the job to equal pay claims. This results in legal uncertainty, which ultimately affects the equal pay legal framework negatively. An analysis is thus needed to determine the suitability and applicability of these grounds of justification to equal pay claims for the promotion of legal certainty. If one accepts that an equal pay claim is justiciable in terms of the EEA, then affirmative action and the inherent requirements of the job constitute the grounds of justification to an equal pay claim *ex lege*. A finding that neither constitutes a suitable ground of justification to an equal pay claim and that they should therefore not apply as such will of necessity have to be based on sound arguments and suggestions. Put differently, affirmative action and the inherent requirements of the job are grounds of justification to an equal pay claim until the contrary is proved.

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104 Landman 2002 *SA Merc LJ* 353.

105 Du Toit *et al Labour Law* 5th ed 617; Du Toit *et al Labour Law* 6th ed 707, where the following is stated "Justification of alleged pay discrimination in terms of either of the two statutory defences is practically ruled out".

106 Cohen 2000 *SA Merc LJ* 260-261.

107 Pieterse 2001 *SALJ* 17.

108 Hlongwane 2007 *LDD* 78. It is axiomatic that affirmative action cannot apply as a ground of justification to all the grounds referred to in s 6(1) of the EEA with reference to equal remuneration claims. Affirmative action applies as a ground of justification only where the discrimination is based on sex, gender and/or race.

6.1 Affirmative action

Section 9(2) of the *Constitution*[109] provides that in order to promote the achievement of equality, legislative measures may be taken to protect or advance persons who were disadvantaged by unfair discrimination. The EEA gives effect to section 9(2) of the *Constitution* by regulating affirmative action in the workplace. In *Minister of Finance v Van Heerden*[110] the Constitutional Court stated the following with regard to whether a measure falls within section 9(2) of the *Constitution*:

> It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality[111]

It is self-evident that if a measure does not pass the above enquiry then the measure is not one contemplated in section 9(2) and is not a remedial measure including an affirmative action measure.

Section 6(2)(a) of the EEA provides that the taking of affirmative action measures which are consistent with the purpose of the EEA is not unfair discrimination. The purpose of the EEA is to achieve equity in the workplace *inter alia* by implementing affirmative action measures to ensure that persons from the designated groups are equitably represented in all occupational categories and levels in the workforce.[112] Section 15(2) of the EEA prescribes the affirmative action measures to be taken by designated employers.[113] These measures are: (a) to identify and eliminate

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109 *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the "*Constitution*").

110 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) (hereafter referred to as "*Van Heerden*").

111 *Minister of Finance v Van Heerden* para 37.

112 Section 2 of the EEA; s 15(1) of the EEA defines affirmative action measures as those measures that are "designed to ensure that suitably qualified people from the designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer"; also see Dupper and Garbers "Affirmative Action" 259 with regard to the comments on the goal of affirmative action.

113 A designated employer is defined in s 1 of the EEA as: "(a) a person who employs 50 or more employees; (b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the annual turnover of a small business as set out in Schedule 4 to the EEA; (c) a municipality as referred to in Chapter 7 of the Constitution; (d) an organ of state as referred to in section 239 of the Constitution, but excluding, local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; (e) an

employment barriers; (b) to diversify the workplace based on equal dignity and respect; (c) to reasonably accommodate people from designated groups in order to ensure that they enjoy equal opportunities; and (d) to ensure the equitable representation of suitably qualified people from the designated groups on all levels in the workforce.[114]

These measures must be reflected in the designated employers' employment equity plan.[115] The measure mentioned in (d) above includes preferential treatment and numerical goals.[116] The question which arises in the context of equal pay claims is whether the preferential treatment as contemplated in section 15(3) of the EEA includes paying suitably qualified persons from the designated groups more than their non-designated counterparts in the workforce in order to ensure equitable representation. On a literal reading of section 15(3) read with section 15(2)(d)(i) of the EEA, it would seem that it does. This reading is, however, not dispositive of the suitability of affirmative action as a ground of justification to equal pay claims, as it still has to be analysed in accordance with the purpose of the EEA and the matrix relating to equal pay claims. It should be noted that chapter 3 of the EEA, which deals extensively with affirmative action, does not apply to non-designated employers,[117] but non-designated employers are nevertheless not exempt from the provisions of section 6(2)(a) of the EEA[118] which lists affirmative action as one of the grounds of justification to an unfair discrimination claim. Therefore, a non-designated employer may raise the defence of affirmative action and by implication may take affirmative action measures within its workplace.[119] The author will,

employer bound by a collective agreement as referred to in sections 23 or 31 of the Labour Relations Act 66 of 1995, which collective agreement appoints the employer as a designated employer".

114 Section 15(2)(a)-(d)(i) of the EEA.

115 Section 20(2)(b) of the EEA. Meintjes-Van der Walt 1998 *ILJ* 32-33 has suggested that the implementation of employment equity plans could eradicate pay inequity and consequently level the playing fields.

116 Section 15(3) of the EEA. It is apposite to note that while numerical goals are allowed, quotas are not (s 15(3) of the EEA). In *Solidarity obo Barnard v SAPS* 2014 2 SA 1 (SCA) para 68 the Supreme Court of Appeal remarked that where numerical goals and representivity are applied as absolute criteria to appointments, this application would transform the numerical goals into quotas, which are outlawed in terms of the EEA.

117 Section 12 of the EEA.

118 The section falls within ch 2 of the EEA, which does not exclude non-designated employers from its ambit.

119 See Dupper and Garbers "Affirmative Action" 269, who stated that affirmative action measures taken by a non-designated employer falls beyond the framework of statutory employment equity plans and such an employer will have to prove that it is taking affirmative action measures that are consistent with the purpose of the EEA

hereinafter, deal with affirmative action only as it relates to designated employers.[120]

It is apposite to note that affirmative action applies only to suitably qualified persons[121] from the designated groups.[122] The designated groups are defined as black people, women, and people with disabilities.[123] As a corollary to the definition of designated groups it is clear that affirmative action may be relied upon as a ground of justification only in circumstances where the discrimination is based on race, sex, gender and/or disability. To this extent, the justification of affirmative action is of limited application. It then follows that affirmative action cannot be relied on as a ground of justification in circumstances where the discrimination is based on grounds other than, race, sex, gender and/or disability. With the aforementioned in mind, it is then prudent to analyse the suitability of this ground of justification in relation to equal pay claims.

In order to analyse affirmative action as a ground of justification to equal pay claims, the following question is postulated. Does paying an employee from a designated group a higher wage than his/her counterpart from a non-designated group in order to ensure the equitable representation of designated employees in all categories and levels of the workplace amount to an affirmative action measure? If it does, it would mean that it may be relied upon by an employer as a ground of justification to an equal pay claim based on race, sex and/or gender.

The EEA states that in order to determine whether a designated employer is implementing its employment equity plan in accordance with the EEA, one must have regard *inter alia* to the number of suitably qualified

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as prescribed by s 2 of the Act if it wishes to rely on the ground of justification contained in s 6(2)(b) of the EEA.

120 The comments made, hereinafter, regarding affirmative action as it relates to designated employers are instructive to non-designated employers with regard to them taking affirmative action measures and raising the same as a ground of justification to an equal pay claim.

121 A suitably qualified person refers to a person who may be qualified for a job as a result of one or more of the following factors: formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable period, the ability to do the job (ss 1 read with 20(3)(a)-(d) of the EEA).

122 Section 2 of the EEA; s 15(1) of the EEA.

123 Section 1 of the EEA; black people refers to Africans, Coloured persons and Indians (s 1 of the EEA); people with disabilities refers to people who have a long-term physical or mental impairment which substantially limits their prospects of employment (s 1 of the EEA). In *Chinese Association of South Africa v Minister of Labour* (TPD) (unreported) case number 59251/2007 of 18 June 2007 the High Court held that Chinese people who are also South African citizens fall within the ambit of the definition of "black people" in s 1 of the EEA.

employees from the designated groups from which the employer may *promote* or *appoint*.[124] The EEA does not mention as an affirmative action measure the paying of a designated employee more than the employee's non-designated counterpart.[125] It is submitted that the absence of mention of the higher pay as an affirmative action measure coupled with the reference to the promotion and appointment of designated employees is a strong indication that paying a designated employee more than the employee's non-designated counterparts does not fall within the ambit of an affirmative action measure. In *Van Heerden* the Constitutional Court stated with reference to the second requirement of the threefold enquiry, *inter alia*, that if the remedial measures display naked preference, are arbitrary or capricious, then they cannot amount to measures which are designed to achieve the constitutionally authorised end.[126] It is further submitted, in the light of *Van Heerden*, that the paying of higher wages as an affirmative action measure would amount to naked preference, which would be arbitrary.

Dupper states that affirmative action is a temporary measure that should cease operating once it has achieved its goal (measures) and the duration of affirmative action programmes is intrinsically linked to the justification proffered for their existence. He further states that if the affirmative action measures continue to operate notwithstanding the achievement of the goals, then this will be regarded as discrimination.[127] It is important to note that an employment equity plan cannot be shorter than 1 year or longer than

124 Section 42(a)(ii) of the EEA. See Dupper and Garbers "Affirmative Action" 259, who stated that s 42 of the EEA provides important indications as to the meaning of the term equitable representation as used in s 2 of the EEA.

125 Section 15(2) of the EEA.

126 *Van Heerden* para 41.

127 Dupper 2008*SAJHR* 439; Dupper and Garbers "Affirmative Action" 262; McGregor 2006 *JBL* 19 has suggested that affirmative action will cease once the past imbalances are rectified. See *George v Liberty Life Association of Africa Ltd* 1996 17 ILJ 571 (IC) 593, wherein the Industrial Court remarked that affirmative action is an interim measure which is temporary in nature. In *Willemse v Patelia* [2006] JOL 18510 (LC) para 73 the Labour Court held that the employer having achieved its affirmative action goals was bound in terms of its policy directives to apply the criterion of merit with regard to promotion. In *Unisa v Reynhardt* 2010 12 BLLR 1272 (LAC) para 30, the Labour Appeal Court held that once the appellant had reached its employment targets the preferential treatment (affirmative action) no longer applied and appointments were to be made based on merit. Mushariwa 2012 *PELJ* 423 has stated that it is cardinal for employers to know if and when they have reached their affirmative action targets as a failure to do so will result in non-designated employees being subject to discrimination which would be unfair.

5 years.[128] It is thus clear that an affirmative action measure cannot survive in perpetuity, as it will come to an end once the objective has been achieved.

The following further questions are postulated with reference to paying an employee from a designated group more than his/her counterpart from a non-designated group in order to ensure the equitable representation of designated employees in all categories and levels of the workplace. What will the lifespan of this measure be? Will the employer pay the employee from the designated group a higher salary than a non-designated employee in perpetuity? The answer to these questions will be set out in the form of an example.

For example, with regard to an affirmative action measure regarding appointments (or promotions) of designated persons, the employment equity plan refers to the target of 50% designated employees in all categories and levels of the workplace. Once the employer has reached the target of appointing (promoting) 50% of designated employees in its employ, then the target has been achieved and the affirmative action measure in that regard has come to an end. This means that the affirmative action measure can no longer apply, and if it does, this *ultra vires* application will be regarded as discrimination which will be unfair. It is difficult to postulate a similar example with the measure being paying a higher salary to designated employees as an affirmative action measure. The difficulty lies in determining the lifespan of the measure, and this results from the measure itself. It is submitted that paying higher wages should not be regarded as an affirmative action measure due to its impracticality and the creation of new pay differentials innate in its application.[129] In *Van Heerden* the Constitutional Court stated with reference to the third requirement of the threefold test, *inter alia*, that a remedial measure must not impose substantial and undue harm or constitute an abuse of power on those who are excluded from its benefits, as this will threaten the country's long-term constitutional goal of equality.[130] It is submitted that, based on this, the paying of higher wages should not be regarded as an affirmative action measure due to the potential substantial and undue harm that it would cause to those who are excluded from its benefits.

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128 Section 20(1)(e) of the EEA.

129 This suggestion is supported by s 27(2) of the EEA, which provides that a designated employer must implement measures to reduce disproportionate pay differentials. See Hlongwane 2007 *LDD* 81-82 and Pieterse 2001 *SALJ* 14 for a general discussion of s 27 of the EEA.

130 *Van Heerden* para 44.

In the light of the above analysis, it is finally submitted that affirmative action is not a suitable ground of justification to equal pay claims.

6.2 Inherent requirements of the job

Inherent requirements of the job are not defined in the EEA but they have been given meaning by the Courts. Article 2 of the *Discrimination Convention* states that any distinction, exclusion, or preference in respect of a particular job based on its inherent requirements will not be deemed to be discrimination.[131] The *Discrimination Convention*, however, does not provide a definition for the term "inherent requirements of the job". It is then necessary to analyse the meaning of this as developed by the case law.

In *Whitehead v Woolworths (Pty) Ltd*[132] the Labour Court defined an inherent requirement of a job as referring to an indispensable attribute which must relate in an inescapable way to the performing of the job.[133] In *Woolworths (Pty) Ltd v Whitehead*[134] the Labour Appeal Court adopted a more flexible approach than the Labour Court by finding that rational and commercially understandable considerations constituted adequate justification to a claim of discrimination on the ground of pregnancy.[135] In *Ntai* the Labour Court rejected mere commercial reasons as a justification and adopted a strict approach which is akin to business necessity.[136] Du Toit *et al* suggest that a commercial rationale cannot by itself establish an inherent requirement of the job, and clear evidence regarding the nature of the requirement of the job should be led to place the court in a position to make a finding as to whether or not the employer's decision based on that requirement is reasonable.[137]

In *Lagadien v University of Cape Town*[138] the Labour Court found that proven skills, experience and knowledge were indispensable requirements for the particular job and the refusal to appoint a person who lacked these qualities was permissible within the meaning of the inherent requirements

131 *Discrimination (Employment and Occupation) Convention* 111 of 1958.
132 *Whitehead v Woolworths (Pty) Ltd* 1999 8 BLLR 862 (LC).
133 *Whitehead v Woolworths (Pty) Ltd* 1999 8 BLLR 862 (LC) para 34; also see Pretorius, Klinck and Ngwena *Employment Equity Law* 5-15 (fn 72), wherein the authors have suggested that notwithstanding the overturning of the Labour Court's decision by the Labour Appeal Court, the former court's definition of the inherent requirements of the job has not been affected and remains intact.
134 *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC).
135 *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC) 688.
136 *Ntai* para 88.
137 Du Toit *et al Labour Law* 5th ed 607.
138 *Lagadien v University of Cape Town* 2001 1 BLLR 76 (LC).

of the job as espoused in section 6(2)(b) of the EEA.[139] Naidu has stated that inherent requirements of the job are requirements that cannot be removed from the job without radically changing the nature of the job, and a job that can be performed without imposing the requirements fails the test.[140]

Dupper and Garbers have stated that it can be inferred from the phrase "inherent requirement of a job" that "only essential job duties should be taken into account and that if the requirement is not met, the job cannot be done".[141] Du Toit *et al* have suggested that the inherent requirements of the job should be analysed within the matrix of the following criteria: (i) they must be a permanent feature of the job; (ii) they must be essential to the job; and iii) they must be indispensable to the performance of the work.[142]

It is important to analyse the possibility of the ground of justification being applied to an equal pay claim by way of examples.

A and B perform *equal work*, but A is paid less than B and alleges that the pay discrimination is based on race as A is a black male and B is a white male. The employer will not be able to rely successfully on the inherent requirements of the job as a justification to the pay discrimination because A and B perform equal work, meaning that they both comply with the inherent requirements of the job. This example is based on the assumption that A proves the racial discrimination and the onus then shifts to the employer to justify the discrimination.

A and B perform *work of equal value*, but A is paid less than B and alleges that the pay discrimination is based on race as A is a black male and B is a white male. The employer will not be able to rely on the inherent requirements of the job as a justification to pay discrimination because different requirements are envisaged by the concept equal value and the requirements of the two jobs will of necessity be different but may be proven to be of equal value. This example is based on the assumption that A proves the racial discrimination and the onus then shifts to the employer to justify the discrimination.

139 *Lagadien v University of Cape Town* 2001 1 BLLR 76 (LC) 83.
140 Naidu 1998 *SA Merc LJ* 181.
141 Dupper and Garbers "Justifying Discrimination" 83.
142 Du Toit *et al Labour Law* 5th ed 608.

In the light of the above analysis, it is submitted that the inherent requirements of the job is not a suitable ground of justification to equal pay claims.

7 Conclusion

It is clear from South African law that affirmative action and the inherent requirements of the job have not been used as grounds of justification to equal pay claims. The equal pay laws of the United Kingdom do not refer to affirmative action and the inherent requirements of the job as grounds justifying pay differentiation. It is important to note that the factors listed in the Employment Equity Regulations are more in line with the grounds of justification to equal pay claims as found in the case law of South Africa and the United Kingdom. This substantiates the argument that affirmative action and the inherent requirements of the job are not suitable as grounds of justification to equal pay claims.[143] It will thus be important to mention that section 6(2) of the EEA does not apply to equal pay claims under section 6(4) of the EEA, as this will avoid unnecessary litigation regarding this aspect and it will at the same time promote legal certainty, which will strengthen the equal pay legal framework. This should be mentioned in the form of an amendment to section 6 of the EEA as follows: "The grounds of justification listed in section 6(2)(a)-(b) are not applicable to a claim under section 6(4)."[144]

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143 It is apposite to note that s 11 of the EEA relating to the burden of proof provides, *inter alia*, that "… If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination (a) did not take place as alleged: or (b) is rational and not unfair, or is otherwise justifiable". Reference to *otherwise justifiable* means that the grounds of justification are extended beyond those of affirmative action and the inherent requirements of the job as contained in s 6(2)(a)-(b) of the EEA.

144 The words and numbers underlined indicate insertions.

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List of Abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
EA	Equality Act of 2010
EEA	Employment Equity Act 55 of 1998
EPA	Equal Pay Act of 1970
FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
ILO	International Labour Organisation
JBL	Juta's Business Law
LDD	Law, Development and Democracy
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal